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In the Supreme Court

of the United States

OCTORER TERM 1966

No. 1024

EVELYN SUE DILLARD,

Petitioner,

v.

CARL MASON DILLARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, EVELYN SUE DILLARD, Plaintiff-Respondent below, respectfully prays a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon, entered in the above-entitled case on October 12, 1966, and in which a Petition for Rehearing timely filed was denied on November 9, 1966.

OPINIONS BELOW

The opinion of the Circuit Court of the State of Oregon for Columbia County denying respondent's motion to satisfy the judgment under ORS 18.420 is unreported and is appended hereto at pages 10-11.

The opinion of the Supreme Court of the State of Oregon for Columbia County is reported at 83 Or. Adv. Sh. 261, — P.2d —, and is appended at pages 12 to 16.

No written opinion was rendered by the Supreme Court of the State of Oregon in denying a petition for rehearing.

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was dated and entered October 12, 1966. On November 9, 1966 an order of said Court was filed denying a Petition for Rehearing.

This Court has jurisdiction to review the judgment in question by writ of certiorari because it involves interpretation of the Federal Bankruptcy Act by a state court.

QUESTIONS PRESENTED

1. If a defendant voluntarily drives his car while under the influence of intoxicating beverages, and in so doing causes injury to another, is the debt as a result of a judgment based thereon dischargeable in bankruptcy?

2. In Oregon, where a guest passenger must plead and prove gross negligence in order to recover against the defendant, and "gross negligence" has been defined by Oregon to be wanton misconduct, and by statute and state decision the equivalent of driving while under the influence of intoxicants, is a judgment based on such gross negligence dischargeable in bankruptcy?

STATUTES INVOLVED ARE:

1. The Bankruptcy Act, Title 11, Sec. 35 U.S.C.A., which reads:

> "A discharge in Bankruptcy shall release a Bankrupt from all debts except such as . . ., (2) are liabilities . . . for the wilful and malicious injury to the person or Property of another."

2. 1 Oregon Rev. Statutes, Sec. 18.420, Page 132:

> "Any person discharged from his debts pursuant to the federal bankruptcy laws may file in any Court or tribunal in which a judgment has at any time been rendered or a transcript thereof filed against him, either before or after such discharge, a motion in the suit, action or proceeding for the discharge of the judgment from the record. If it appears to the court that he has been discharged from the payment of the judgment or the claim upon which the judgment was based, the court shall order that the judgment be discharged and satisfied of record, and thereupon the clerk of the court shall enter a satisfaction thereof; however, no such order shall be granted except upon such notice to the parties interested

as the court or judge thereof may by order prescribe."

3. 1 Oregon Rev. Statutes, Sec. 30.115, Page 208:

"No person transported by the owner or operator of a motor vehicle, an aircraft, a watercraft, or other means of conveyance, as his guest without payment for such transportation, shall have a cause of action for damages against the owner or operator for injury, death or loss, in case of accident, unless the accident was intentional on the part of the owner or operator or caused by his gross negligence or intoxication. As used in this section:

(2) 'Gross negligence' refers to negligence which is materially greater than the mere absence of reasonable care under the circumstances, and which is characterized by conscious indifference to or reckless disregard of the rights of others."

STATEMENT OF THE CASE

Petitioner was seriously injured while riding with respondent in respondent's car and thereafter she brought an action for personal injuries based on two counts. The first count alleged respondent operated his vehicle while in an intoxicated condition and the accident was caused as a proximate result of defendant's intoxication. The second count realleged the allegations of the first, including the intoxication, and also stated, "that the proximate cause of said collision and plaintiff's resulting injuries was the operation of said vehicle by this defendant in a grossly negligent and careless manner as follows:

1. In driving at a high and excessive rate of speed;

2. In failing to keep and maintain any code and control over the vehicle;

3. In failing to keep and maintain a proper lookout."

The jury returned a general verdict, with no special findings against defendant, the respondent, and in favor of petitioner in the sum of $76,491.40. A judgment was entered on said verdict for this amount and costs of $122.04.

Thereafter respondent applied for and obtained a discharge in Bankruptcy through the United States District Court for the District of Oregon and on September 1, 1965 under ORS 18.420 filed a motion in the personal injury action to have the judgment discharged from the record. The trial court, who was the same judge that heard the evidence in the personal injury case, denied this motion.

The respondent appealed from this ruling to the Supreme Court of the State of Oregon. Respondent assigned as error the holding by the trial court that plaintiff's injuries were caused by "wilful or malicious" conduct of defendant, or any conduct equivalent thereof.

This case involved construction by the Oregon Courts of part of the Bankruptcy act, that is Title 11, Section 35 U.S.C.A., and requires a determination as to whether a judgment based on driving while intoxicated or on gross negligence as defined by the Oregon

Court is a liability for the wilful or malicious injury to the person of another and excluded from discharge on that basis.

REASONS FOR GRANTING THE WRIT

1. The question presented is of importance in the administration of the Federal Bankruptcy Law. Settlement of the question by this Court is in the public interest since it is likely to be presented increasingly considering the number of accidents as a result of drunk driving or gross negligence or both and considering the increases in the numbers of voluntary bankruptcies being filed in order to obtain discharge.

2. The decision of the court below in this case is in conflict with the language of decisions of the Supreme Court where in *Tinker* v. *Colwell*, 193 U.S. 473, 24 S. Ct. 505 (1904), the court stated:

> ". . . in order to come within that meaning as a judgment for a wilful and malicious injury to persons or property, it is not necessary that the cause of action be based upon special malice so that without it the action could not be maintained . . . A wilful disregard of what one knows to be his duty, an act which is against good morals, and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done wilfully and maliciously, so as to come within the exception."

3. The decision in the court below is in direct conflict with decisions on the same subject decided in various federal courts. There is a split of authority

in all directions in all courts on the subject, although most of the more recent decisions hold directly in conflict with the Oregon decision.

In *Greenfield* v. *Tuccillo*, (2d Cir.) 129 F.2d 854 wilful and malicious has been defined as "wilful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury. *In Re Dutkiewicz*, (D.C.), 27 F.2d 334, 335 defined wilful negligence as that degree of neglect arising where there is a reckless indifference to the safety of human life or an identical failure to perform a manifest duty to the public. Also see *In Re Greene* (7th Cir.) 87 F.2d 951, 109 A.L.R. 1188. *In Re Smith*, 161 S. Supp. 896 (W.D.N.Y. 1956) held a judgment for drunk driving injuries not dischargeable. Also see, *Den Haerynck* v. *Thompson*, (10 Cir.), 228 F.2d 72, *Harrison* v. *Donnelly*, (8 Cir.), 153 F.2d 588.

4. The various state courts are in disagreement as to whether a discharge would be allowed under the circumstances of the Dillard case. In *Wegiel* v. *Hogan*, 28 N.J. Super 144, 100 A.2d 349 (1953) where a motorist struck and killed two pedestrians and all evidence was circumstantial as to the "wilful and maliciousness of the defendant" and there was no award of punitive damages and the complaint did not charge "wilful and malicious injury" and the judgment was a general award of damages, the debt was held not discharged and within the exception. *Rosen* v. *Shingleur*, 47 So. 2d 141 (1950) held if a motorist

deliberately gets drunk and regardless of the rights of others, projects his car on the highway his act is wilful and malicious within the meaning of the bankruptcy act.

In *Goldstein* v. *Humway*, — Ohio —, 191 N.E.2d 597, Plaintiff's petition alleged defendant "while under the influence of intoxicants . . . swerved the vehicle . . . causing it to strike plaintiff . . ." The debt there was held not dischargeable.

5. The Oregon Rule is well settled that the gross negligence which a guest passenger must prove in order to recover must consist of negligence of such a character as to amount to wanton misconduct and the Oregon guest statute defines it in terms of that "which is characterized by conscious indifference to or reckless disregard of the rights of others," ORS 30.115. The Oregon Court defines gross negligence as "wanton misconduct." *Williamson* v. *McKenna*, 223 Or. 366, 354 P.2d 56 (1960). *Zumwalt* v. *Lindland*, 239 Or. 26, 396 P.2d 205 (1964) stated gross negligence to be the equivalent of driving while intoxicated. The Oregon court has also stated that voluntary intoxication is a circumstance highly relevant on the issue of wanton conduct. *Falls* v. *Mortensen*, 207 Or. 130, 295 P.2d 182 (1956). Under the Oregon rules stated the holding in this case is in direct conflict with the decisions above noted. It is also in conflict with the following cases:

Reell v. Central Illinois Electric & Gas Co., 317 Ill. App. 106, 45 N.E.2d 500 (1942);

Buck v. Alex, 350 Ill. 167, 182 N.E. 794, 182 N.E. 242;
Margulies v. Garwood, 36 N.Y.S.2d 946;
Tharp v. Breitowich, 323 Ill. App. 261, 55 N.E. 2d 392, 323 U.S. 801 (Cert. Den.);
Nunn v. Drieborg, 235 Mich. 283, 209 N.W. 89, 8 Am. Bank. Rep. (1926);
Saueressig v. Jung, 246 Wis. 82, 16 N.W.2d 417.

CONCLUSION

Because of the vital importance of the issues presented to the public and the necessity to have some certainty in administration of the Bankruptcy Act by both the state and federal court systems, petitioner respectfully prays that its petition for a writ of certiorari to the Supreme Court of Oregon be granted.

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF COLUMBIA

EVELYN SUE DILLARD,)
Plaintiff,) Case No.
v.) 15222
CARL MASON DILLARD,)
Defendant.)

ORDER DENYING DEFENDANT'S MOTION TO SATISFY JUDGMENT UNDER ORS 11.426

This matter coming on to be heard before the undersigned judge of the above-entitled Court on the 28th day of September, 1965, the Plaintiff appearing by and through one of her attorneys, Agnes Marie Petersen, and the Defendant appearing by and through his attorney, George VanNatta, and the attorneys for the parties having stipulated that the Defendant in the above case has heretofore filed a voluntary petition for bankruptcy in the United States District Court for the District of Oregon and having received a discharge in said proceedings on all debts that were dischargeable therein, and the court having heard the arguments of counsel and considered the points and authorities submitted and having taken the matter under advisement and

IT APPEARING TO THE COURT from the records and files of this case that this is an action by a guest passenger for personal injuries as a result of the gross negligence of the Defendant, or as a result

of the driving by defendant while under the influence of intoxicating beverages, and that the evidence in this case was such that the jury could have found the defendant guilty of both gross negligence and driving while intoxicated, and the court being fully advised, and good cause appearing therefor,

IT IS HEREBY ORDERED, that Defendant's Motion to satisfy the Judgment in this action in accordance with ORS 18.420 be and the same hereby is denied.

Dated October 19, 1965.

/s/ J. S. BOHANNON
Circuit Judge

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

Evelyn Sue Dillard,

Respondent,

v.

Carl Mason Dillard,

Appellant.

* * * * *

Appeal from Circuit Court, Columbia County
J. S. Bohannon, Judge.

Argued and submitted September 12, 1966

George C. Van Natta, St. Helens, argued the cause and filed a brief for appellant.

Agnes Marie Petersen, St. Helens, argued the cause for respondent. With her on the brief was Ben T. Gray, Portland.

Before McAllister, Chief Justice, and Perry, Sloan, O'Connell, Goodwin, Denecke and Holman, Justices.

Reversed and remanded.

O'CONNELL, J.

This is an appeal from an order denying defendant's motion for a discharge of a judgment from the record upon proof that he had received a discharge in bankruptcy.

Plaintiff was seriously injured while riding with defendant in the latter's automobile. Plaintiff brought an action for personal injuries and recovered judgment on a verdict for $76,491.40. Defendant received a discharge in bankruptcy. Proceeding under ORS 18.420 he filed a motion in the present action for the discharge of the judgment from the record.[1] The trial court denied the motion, apparently on the theory that defendant's liability was for a wilful and malicious injury and, therefore, was not discharged in bankruptcy.[2] The trial court's order simply recites:

"IT APPEARING TO THE COURT from the records and files of this case that this is an action by a guest passenger for personal injuries as a result of the gross negligence of the Defendant, or as a result of the driving by defendant while under the influence of intoxicating beverages, and that the evidence in this case was such that the

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[1] "18.420. (1) Any person discharged from his debts pursuant to the federal bankruptcy laws may file in any court or tribunal in which a judgment has at any time been rendered or a transcript thereof filed against him, either before or after such discharge, a motion in the suit action or proceeding for the discharge of the judgment from the record. If it appears to the court that he has been discharged from the payment of the judgment or the claim upon which the judgment was based, the court shall order that the judgment be discharged and satisfied of record, and thereupon the clerk of the court shall enter a satisfaction thereof; however, no such order shall be granted except upon such notice to the parties interested as the court or judge thereof may by order prescribe."

[2] Title 11, § 35 USCA provides in part as follows:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts * * * except such as * * * (2) are liabilities * * * for willful and malicious injuries to the person or property of another. * * *."

jury could have found the defendant guilty of both gross negligence and driving while intoxicated, and the court being fully advised, and good cause appearing therefor

"IT IS, HEREBY ORDERED, that Defendant's Motion to satisfy the Judgment in this action in accordance with ORS 18.420 be and the same hereby is denied."

The trial court's order can be sustained only if it can be said that the verdict constitutes a declaration by the jury that defendant was guilty of wilful and malicious conduct. In the present case, however, it is impossible to determine the basis upon which the jury arrived at its verdict. Plaintiff sets out in her brief the facts demonstrating the enormity of defendant's fault. We have no way of knowing whether or not plaintiff's representations in this regard are true because the record brought up on this appeal does not contain the transcript of testimony. Even if we had the record before us and it disclosed evidence from which the jury could have concluded that defendant acted maliciously, we still would not know whether the verdict was reached upon that basis.

If plaintiff had alleged in her complaint a cause of action sustainable only upon a showing of wilful and malicious conduct, then of course the verdict could be regarded as an affirmation of the charge. But this was not the case here. The complaint contains two counts, each of which was designated to save plaintiff from the proscription of the guest statute, ORS 30.115. The first count contains an allegation "that

defendant was then and there operating said vehicle while in an intoxicated condition, and said accident was caused all as a proximate result of his intoxication."[3] The second count contains the following allegation: "That the proximate cause of said collision and plaintiff's resulting injuries * * * was the operation of said vehicle by this defendant in a grossly negligent and careless manner, as follows:

"1. In driving at a high and excessive rate of speed;

"2. In failing to keep and maintain any control over said vehicle;

"3. In failing to keep and maintain a proper lookout."

It is possible that the jury predicated liability upon the first count. The mere fact that one injures another as a result of driving while intoxicated does not necessarily establish that the injury was maliciously or wilfully inflicted.[4] The jury could have found that defendant's conduct in driving while intoxicated was the cause of plaintiff's injury but that the conduct was not malicious and wilful. This being so it would be pure speculation upon our part and upon the part of the trial court to hold as a matter of law that the defendant's liability was for a malicious and wilful injury. . .

---

[3] No question is raised as to the sufficiency of the allegation to state a cause of action.

[4] *Combos* v. *Ashe.*, 158 Cal. App. 2d 517, 322 P.2d 933 (1958).

Plaintiff argues that the jury could have decided that defendant was liable under the second count for driving in a grossly negligent manner, and that gross negligence is the equivalent of malicious and wilful conduct. For the reasons set forth above, we do not find it necessary to reach this question.[5]

The judgment is reversed and the cause is remanded with the direction that the judgment against defendant be discharged under ORS 18.420.

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[5] However, see *Zumwalt* v. *Lindland*, 239 Or. 26, 396 P.2d 205 (1964).